Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for Decision

Communications, Energy and Paperworkers Union of Canada,

complainant,

and

Dilico Anishinabek Family Care,

respondent.

Board File: 29171-C

Dilico Anishinabek Family Care,

applicant,

and

Communications, Energy and Paperworkers Union of Canada,

respondent.

Board File: 29471-C
Neutral Citation: 2012 CIRB **659**
October 12, 2012

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and Robert Monette, Members.

Parties' Representatives of Record

Mr. Jesse Kugler, for the Communications, Energy and Paperworkers Union of Canada;

Ms. Mandy Fricot, for Dilico Anishinabek Family Care.

These reasons for decision were written by Mr. Robert Monette, Member.

I–Overview of the Proceedings

[1] On December 12, 2011, the Communications, Energy and Paperworkers Union of Canada and its Local 7-0-1 (the union) filed a complaint with the Board (file no. 29171-C) pursuant to section 97(1) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*). It alleges that Dilico Anishinabek Family Care (the employer) is engaged in a harassment and intimidation campaign directed at the union's executive, that it is intentionally attempting to undermine the union in its ability to represent employees, that it is failing to recognize the union as the legitimate bargaining agent of the employees, and that it is retaliating against the union executive for participating in the union's activities, all of which are allegedly in violation of sections 94(1)(*a*), 94(3)(*b*), 94(3)(*e*) and 96 of the *Code*.

[2] The union was certified by the Board on August 5, 2005 (order no. 8919-U) for a unit comprising:

> all employees of Dilico Ojibway Child and Family Services working in and out of Fort William First Nation and the City of Thunder Bay, Ontario, **excluding** executive secretary, senior finance officer, systems coordinator, supervisors and those above the rank of supervisors and students.

[3] In 2010, the Board had issued its reasons for decision in *Dilico Ojibway Child and Family Services*, 2010 CIRB 489 (RD 489), in support of this order.

[4] By response dated January 6, 2012, the employer objected to various allegations in the complaint, stating that it was untimely pursuant to the 90-day time limit set out at section 97(2) of the *Code*. The employer denies having participated in any alleged violation of the *Code*.

[5] In its response, the employer also included information regarding the fact that it was currently involved in a challenge of the applicability of federal labour legislation to its activities in a pending complaint before the Canadian Human Rights Commission (CHRC), in which it was disputing the conclusion and the facts relied upon by the Board in RD 489.

[6] In its reply dated January 23, 2012, the union maintained all the allegations and conclusions contained in its original complaint. It asked the Board not to entertain the "jurisdictional issue" mentioned by the employer unless it afforded the union the opportunity to request particulars and documentation from the employer and the opportunity to file substantive submissions on the issue. By letter dated April 26, 2012, the employer informed the Board that the CHRC had issued two recent decisions wherein it concluded that the employer's activities were provincially regulated. The employer followed up on June 13, 2012, with a request to "defer and dismiss" the pending complaint on the grounds that this Board allegedly does not have constitutional jurisdiction to deal with the matter.

[7] On the same day, the employer filed a new application with the Board (file no. 29471-C) pursuant to section 18 of the *Code* asking that the Board review, reconsider and rescind order no. 8919-U, on account that it allegedly does not have jurisdiction over the employer's labour relations, this in keeping with recent decisions of the Supreme Court of Canada (SCC) concerning similar issues and facts.

[8] With this new application, the employer also filed a Notice of Constitutional Question with the Board and served the notice on the Attorney General of Canada and on the ministry of the Attorney General for Ontario. The Notice of Constitutional Question reads as follows:

> The Applicant has made an Application pursuant to section 18 of the *Canada Labour Code* to the Canada Industrial Relations Board, asking the Board to review, reconsider and rescind its Decision dated April 15, 2005 (Document No. 203142/CIRB Letter Decision no. 1231) ("April 15, 2005 Decision") in which it concluded that it had jurisdiction over the Applicant's labour relations, and all subsequent Decisions in Board Files 24488-C, 24526-C and 24569-C certifying the Union as the bargaining agent for the Applicant's employees. The Applicant questions the applicability of the *Canada Labour Code*, R.S.C. 1985, c. L-2 as amended, to the labour relations of the Applicant, Dilico Anishinabek Family Care, and submits that the Applicant's labour relations fall under provincial jurisdiction.

[9] In its response dated July 9, 2012, the union raised the fact that the issue of the constitutional jurisdiction over the activities of the employer was currently pending before the Ontario Labour Relations Board (the OLRB), and it asked the Board to defer dealing with the new application in order to avoid potential concurrent and conflicting rulings. The union also argued that the application for review was untimely and well beyond the 21-day time limit set out at section 45(2) of the *Canada Industrial Relations Board Regulations, 2001*, to reconsider one of its decision. The union points out that the decision to be reconsidered here dates back to 2005 and to 2010. On the merits of the constitutional issue, the union submitted that a hearing should be conducted by the Board in order to establish the constitutional facts and allow for argument.

[10] In its submission dated July 10, 2012, the employer argues that deferral by the Board is not appropriate, that the application is not untimely, and that a formal hearing is not necessary to determine the jurisdictional issue because the necessary facts and arguments are already part of the record.

II–Interim Ruling by the Board

[11] Following all the parties' submissions, the Board addressed the issue of deferral and the issue of timeliness by way of its interim decision in *Dilico Anishinabek Family Care*, 2012 CIRB 655 (RD 655). The Board therein decided that the application for review (file no. 29471-C) was not untimely and that it would not postpone consideration of the jurisdictional issue, even if proceedings currently before the OLRB are raising the same issues between the parties.

[12] In RD 655, the Board ruled that the application was not governed by the 21-day time limit set out for the reconsideration process and that it was therefore not untimely:

> [49] Dilico's request that the Board review its underlying jurisdiction, as a result of recent SCC constitutional decisions, is not subject to any time limit. Dilico's review application is separate and distinct from those subject to the time limits found in the Board's reconsideration process.

[13] On the issue of deferral, the Board noted in its interim decision that, for the time being and despite various proceedings recently before the OLRB, the provincial tribunal has not yet examined the jurisdictional issue. The Board decided not to defer its examination and determination of the constitutional issue:

> [50] The Board has also decided not to postpone considering Dilico's arguments about jurisdiction.

[14] On the issue of holding a formal hearing, the Board noted the following in its interim decision:

> [48] Accordingly, the Board will not defer or postpone consideration of the issue Dilico has raised. Unless the Board advises the parties otherwise, it will decide the question based on the parties' written submissions already on file.

[15] What must be addressed in this case is the jurisdictional question. As the issue is raised in both pending matters, the Board's conclusion will be applicable to both. Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to issue its decision on the jurisdictional issue without an oral hearing in both pending matters, namely, the complaint (file no. 29171-C) and the review application (file no. 29471-C).

III–The Facts

[16] As disclosed by the evidence, the employer is a multi-disciplinary service agency for community native child and family services to First Nations and Anishinabek people, providing child welfare services, mental health and addiction services as well as health services.

[17] The employer provides these services both on and off reserves to persons who self-identify as First Nations or Anishinabek people. It has been incorporated under the Ontario *Corporations Act*, R.S.O. 1990, c. C.38, since July 23, 1986, and its head office and largest service site is located on Fort William First Nation Reserve. It also has various satellite service sites in and around the city of Thunder Bay, Ontario.

[18] The employer is designated as an approved Children's Aid Society, in accordance with the provision of the Ontario *Child and Family Services Act*, R.S.O. 1990, c. C.11, and such services are funded mostly by the Ontario Ministry of Children and Youth Services.

[19] The union does not dispute the facts contained in the employer's submissions. The employer indicates that the Board was incorrect in some of the constitutional facts it exposed in RD 489; the employer proceeds to correct them by stating that, contrary to paragraph 13 of the decision, only one of its four service sites was then located on reserve land; and contrary to paragraph 20 of the decision, at least 75% of its operations dealt with child protection work.

IV–Positions of the Parties

[20] The employer argues that the services it provides are essentially the same as those provided by the NIL/TU,O Child and Family Services Society that were recently considered by the SCC. Relying on the reasons and conclusions of two cases before the SCC, namely, *NIL/TU,O Child and Family Services Society* v. *B.C. Government and Service Employees' Union*, 2010 SCC 45; [2010] 2 S.C.R. 696 (*NIL/TU,O*) and *Communications, Energy and Paperworkers Union of Canada* v. *Native Child and Family Services of Toronto*, 2010 SCC 46; [2010] 2 S.C.R. 737 (*Native Child*), the employer submits that it is now settled law that the labour relations associated with such services are provincially regulated.

[21] As for the fact that this Board originally applied the provisions of the *Code* to issue a certification order in 2005 (with reasons for decision issued in 2010) regarding the employer's activities, the employer submits that it is necessary for the Board to now review that conclusion and find that it does not have constitutional jurisdiction to decide the matter. It adds that the Board reconsidered a similar certification in *Oneida of the Thames EMS*, 2011 CIRB 564, where it had found in favour of provincial regulation and consequently rescinded its original certification order issued under the *Code*.

[22] While the union purported to reserve the right to provide further submissions beyond the issue of timeliness and beyond the issue of deferral, it ultimately did not file additional submissions concerning the issue of jurisdiction.

V–Analysis and Decision

[23] In the Board's view, the services provided by the employer are indeed very similar to those that were considered by the SCC in both the *NIL/TU,O* and *Native Child* cases cited above, which were rendered subsequent to the issuance by the Board of its original certification order and reasons for decision between the present parties in 2005 and 2010.

[24] In considering the NIL/TU,O activities, the SCC stated:

> [18] In other words, in determining whether an entity's labour relations will be federally regulated, thereby displacing the operative presumption of provincial jurisdiction, *Four B* requires that a court first apply the functional test, that is, examine the nature, operations and habitual activities of the entity to see if it is a federal undertaking. If so, its labour relations will be federally regulated. Only if this inquiry is inconclusive should a court proceed to an examination of whether provincial regulation of the entity's *labour relations* would impair the core of the federal head of power at issue.

[25] Using the functional test, Justice Abella concluded that the essential nature of the activities of this child service was a matter that fell within provincial jurisdiction:

> [45] The essential nature of NIL/TU,O's operation is to provide child and family services, a matter within the provincial sphere. Neither the presence of federal funding, nor the fact that NIL/TU,O's services are provided in a culturally sensitive manner, in my respectful view, displaces the overridingly provincial nature of this entity. The community for whom NIL/TU,O operates as a child welfare agency does not change *what* it does, namely, deliver child welfare services. The designated beneficiaries may and undoubtedly should affect how those services are delivered, but they do not change the fact that the delivery of child welfare services, a provincial undertaking, is what it essentially does.

[26] In the same *NIL/TU,O* case, Chief Justice McLachlin considered the link between these activities and the federal power over "Indians", as contemplated by *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3. She determined as follows:

> [70] We may therefore conclude that the core, or "basic, minimum and unassailable content" of the federal power over "Indians" in s. 91(24) is defined as matters that go to the status and rights of Indians. Where their status and rights are concerned, Indians are federal "persons", regulated by federal law: see *Canadian Western Bank*, at para. 60.
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> ...
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> [74] The question is whether the normal and habitual activities of the Indian operation at issue go to the status and rights of Indians, which reflect the fundamental federal responsibility for Indians in the Canadian constitutional and historical context. Only if the operation's normal and habitual activities relate directly to what makes Indians federal persons by virtue of their status or rights can provincial labour legislation be ousted, provided the impact of the provincial legislation would be to impair this essentially federal undertaking.
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> ...
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> [76] The function of NIL/TU,O is the provision of child welfare services under the umbrella of the province-wide network of agencies providing similar services. The ordinary and habitual activities of NIL/TU,O do not touch on issues of Indian status or rights. The child welfare services therefore cannot be considered federal activities.

[27] Following these court decisions, tribunals have adopted and applied these findings to many parties, including to the present parties. The Board summarizes the reported decisions chronologically:

A–*Oneida of the Thames EMS*, 2011 CIRB 564

[28] On January 14, 2011, the CIRB ruled on an application pursuant to section 18 (much like the one in the instant case) to review its alleged lack of jurisdiction in 2010 when it certified a trade union to represent employees of Oneida of the Thames Emergency Medical Services (Oneida), a land ambulance service not restricted to aboriginal patients. The Board found, based on the recent *NIL/TU,O* and *Native Child* decisions of the SCC, that whether one uses the "functional test" or the "core test", the nature, operations and habitual activities of Oneida are subject to provincial authority and are not included in the "core of Indianness" contemplated by section 91(24) of the *Constitution Act*. The Board rescinded its original certification.

B–*McDames* v. *Gitxsan Child and Family Services Society*, [2011] C.L.A.D. No. 402 (Blaxland)

[29] On November 10, 2011, adjudicator Blaxland issued his award in a section 251 complaint under Part III of the *Code* for unjust dismissal against the employer, a society incorporated in British Columbia to "develop and deliver child and family services in accordance with the values and needs of the Gitxsan ... law, culture and traditions." The Gitxsan are a First Nations people living on six reserve communities governed by the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46. Relying on the SCC decisions in *NIL/TU,O* and *Native Child*, the adjudicator found that the activities of the society were of a provincial nature and declared that he had accordingly no further jurisdiction to deal with the complaint.

C–*Dilico Anishinabek Family Care*, nos. 20110002 and 20110998, March 28, 2012 (CHRC)

[30] In March 2012, the CHRC, in two cases involving Dilico, adopted a finding from a report submitted to it which suggested that Dilico fell under provincial jurisdiction. The CHRC decided not to refer the complaints to the Canadian Human Rights Tribunal for lack of jurisdiction.

D–*Dilico Anishinabek Family Care*, no. 0468-12-M, July 16, 2012 (OLRB); *Dilico Anishinabek Family Care*, no. 1484-12-R, August 16, 2012 (OLRB)

[31] On July 16, 2012, the OLRB decided that the reference for the appointment of a provincial conciliation officer between the present employer and the union should be denied, but it did not decisively deal with the jurisdictional issue (file no. 0468-12-M). A subsequent application for certification with the OLRB was filed by the union and is currently pending (file no. 1484-12-R).

[32] Adopting the principles set out by the SCC, this Board is satisfied that the "functional test" applicable to the nature and habitual activities of the employer results in the conclusion that its labour relations are indeed subject to provincial jurisdiction. The Board also finds that the services do not comprise any of the facets of the "core of Indianness" which might otherwise draw it within the federal jurisdiction.

VI–Conclusion

[33] Accordingly, the Board finds that it did not have constitutional jurisdiction to issue certification order no. 8919-U, which is hereby rescinded. The Board therefore has no authority to deal further with the complaint (file no. 29171-C).

[34] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

Robert Monette
Member